Supreme Court, U.S.
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No. 98-1450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BROWN & ROOT, INC., DENNY ARMSTRONG and JOE PHILLIPS,

Petitioners,

v.

WARREN J. BRECKENRIDGE and CHARLES LEE BOOKER,

Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The respondents, Warren J. Breckenridge, Jr. and Charles Lee Booker, initiated the proceedings at issue in this petition by filing a complaint in the Circuit Court of Kanawha County, West Virginia on September 15, 1997 alleging violations of the West Virginia Human Rights Act, West Virginia Code § 5-11-1, *et seq*. In the complaint, Respondent Breckenridge alleges that he was employed by Petitioner Brown & Root from August 17, 1992 until October 31, 1996, at which time Respondent Breckeridge was laid off, in whole or in part, because of his race. Also in the complaint, Respondent Booker alleges that he was employed by Petitioner Brown & Root from August of 1993 until October 26, 1996 at which time Respondent Booker was laid off, in whole or in part, because of his race. These allegations are based upon the petitioners' practice of allowing only one African-American employee to work at any of its locations at one time. In order to accomplish this goal the petitioners move and lay off their three black employees as needed. Additionally, Petitioner Brown & Root's Equal Employment Opportunity representative admitted to Respondent Booker that the representative's investigation revealed racist feelings toward African-Americans and a plot to lay-off all of Petitioner Brown & Root's African-American employees.

Subsequent to the respondents attempting to initiate discovery in this case, the petitioners filed, with the Circuit Court of Kanawha County, a motion to compel arbitration and a duplicitous motion for protection pursuant to the motion to compel arbitration. These motions were based on the respondents' alleged agreement to submit employment disputes to mediation and/or binding arbitration, which agreements made the respondents' continued employment

contingent on the respondents' acceptance of said agreements, and on the petitioners' alleged refusal to submit their claims to binding arbitration. The Circuit Court, after reviewing the briefs submitted on behalf of the parties' and the oral arguments of counsel, denied the petitioners' motion to compel arbitration based upon the Circuit Court's determination that

> an employees' [sic] right to a trial by jury under the West Virginia Human Rights Act cannot be waived or contracted away, even though as a condition of employment an agreement to arbitrate exists between the parties. _

(Petition, Appendix A).

The petitioners then filed a Petition for Writ of Prohibition in the Supreme Court of Appeals of West Virginia. The West Virginia Supreme Court refused to issue a rule to show cause and refused the writ requested by the petitioners. The petitioners now seek relief from this Court through this Petition for Writ of Certiorari, but prior to the respondents filing this brief in opposition, the petitioners have also instituted another proceeding in the United States District Court for the Southern District of West Virginia requesting that the District Court validate and enforce the arbitration agreements, order the respondents to dismiss their lawsuit in state court, and order the respondents to submit their claims to arbitration proceedings.

REASONS FOR DENYING THE WRIT

The petition's claim that the state courts' actions are in direct conflict with clearly established United States Supreme Court precedent and with clear Congressional expression of federal policy does not warrant review by this Court, because the state courts' actions are not in conflict with any precedent of this Court. Additionally, because the state courts' decisions do not conflict with federal law, this decision does not permit state courts and legislatures to usurp Congressional authority to determine the scope of federal law. Further, in this Petition, the petitioners are essentially asking this Court to federalized all employment contracts, including contracts of adhesion similar to the agreement at issue in this case between construction and/or maintenance workers and their employer, who conditions continued employment on the employee's prospective waiver of his statutory remedies for discrimination. Because of the far reaching effects of granting the relief that the petitioners request and because the decision below was a plainly correct application of the law, this Petition should be denied.

I.

THE DECISION OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

The petitioners claim that the decision of the circuit court conflicts with the decisions of this Court. The petitioners cite *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Perry v. Thomas*, 482 U.S. 483 (1987) for the proposition that

> this Court has consistently resolved this issue by holding that state courts and legislatures lack the

> power to mandate resolution of claims in a judicial forum where the parties have entered into arbitration agreements which encompass those claims and are enforceable under the Federal Arbitration Act.

(Petition, p. 8). These decisions involved agreements to arbitrate disputes contained in a franchise agreement and in a Uniform Application for Securities Industry Registration form, respectively. The petitioners, however, do not discuss any of this Court's opinions that considered mandatory arbitration of employment discrimination claims.

Even the authority on which the petitioners rely does not demonstrate that Congress or this Court intended that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, would preempt the exercise of State authority in the field of employment discrimination. In *Southland Corporation*, this Court began it's opinion by referencing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) which noted that:

> the contract fixing a particular forum for resolution of all disputes "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." The Zapata court also noted that "the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations."

Id. at 14, 92 S. Ct. at 1915.

Nothing in this case indicates that the agreement at issue was made by experienced and sophisticated businessmen or that any negotiation occurred. In both *Southland Corporation* and *Perry*, this Court found that provisions of two different California statutes with language that appeared to prohibit compulsory arbitration of claims conflicted with § 2 of the FAA and thus violated the Supremacy Clause.

However, in this case, no West Virginia statute prohibits compulsory arbitration of claims, but a West Virginia Supreme Court of Appeals decision determined that given the language of the West Virginia Human Rights Act and the policy underlying that Act, an inherent conflict exists between arbitration and the West Virginia Human Rights Act's underlying purposes. *See Copley v. NCR Corp.*, 183 W. Va. 152, 394 S.E.2d 751 (1990). Given this Court's reasoning in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the West Virginia Supreme Court's decision in *Copley*, and thus the Kanawha County Circuit Court's reliance on that precedent, is entirely appropriate. After noting the federal policy favoring arbitration in the FAA and its purpose to place arbitration agreements on the same footing as other contracts, the *Gilmer* Court held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer*, 500 U.S. at 26. The Court further stated that

> [a]lthough all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue."

Gilmer, 500 U.S. at 26. Thus, the burden is on the party who asserts that Congress, or in this case the West Virginia Legislature, intended to preclude arbitration of claims under a given statute to demonstrate such intent with evidence from either the statute or its legislative history or an inherent inconsistency between compulsory arbitration and the statute's underlying framework and purposes. *Gilmer*, 500 U.S. at 26-27.

In *Gilmer*, a case involving a mandatory arbitration provision in an Uniform Application for Securities Industry Registration, the plaintiff brought an age discrimination claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq*. The *Gilmer* Court reviewed the language of the ADEA and it's legislative history and found nothing that precludes arbitration of ADEA claims. In fact, the *Gilmer* Court found specific language directing the Equal Employment Opportunity Commission

> to pursue "informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress.

Gilmer, 500 U.S. 29. Accordingly, this Court concluded that "Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." *Id.*, 500 U.S. at 35.

Initially, the respondents would draw the Court's attention to the language in *Gilmer* that

> "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has

> evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue."

Gilmer, 500 U.S. at 26. The respondents, however, did not make the bargain to arbitrate. The respondents in this case were given the option of agreeing to arbitration or losing their employment, which certainly does not permit the plaintiffs to do any amount of bargaining regarding the terms of their employment. Beyond this issue, the respondents here can demonstrate that the West Virginia Legislature and the West Virginia Supreme Court of Appeals intended to preclude waiver of a judicial forum for West Virginia Human Rights Act claims based upon the West Virginia Supreme Court's holding in *Copley* that "[u]nder West Virginia law, an arbitration clause in an employment contract cannot defeat a human rights action filed by the claimant pursuant to W. Va. Code, 5-11-13(b) (1983)." Therefore, the finding of the Kanawha County Circuit Court, applying *Gilmer* and *Copley*, that

> an employees' [sic] right to a trial by jury under the West Virginia Human Rights Act cannot be waived or contracted away, even though as a condition of employment an agreement to arbitrate exists between the parties.

(Petition, Appendix A) is not in direct conflict with well-settled federal law as enunciated by this Court.

II.

THE QUESTION PRESENTED IS IMPORTANT

The respondents agree that the question presented in the Petition is important in the sense that if this Court grants the petitioners the relief that they request, this Court will set a precedent that federalizes all employment contracts, including contracts of adhesion. Contrary to the petitioners' argument that the decision of the state court "constitutes a substantial threat to the viability of private arbitration as an alternative to judicial proceedings" and that the decision of the state court "eviscerates the Federal Arbitration Act by inviting state legislatures (and courts) to create classes of state law claims that are non-arbitrable" (Petition, p. 7), the decisions of the state court only apply to certain types of employment contracts. This decision will hardly eviscerate the Federal Arbitration Act, because as was correctly stated in the *Gilmer* dissent,

> There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.

Gilmer, 500 U.S. at 39.

If however, this Court grants the relief requested by the petitioners, employers can effectively eliminate any right of an employee to pursue discrimination claims in either the federal or state courts by requiring the employee to sign an arbitration agreement if the employee wants to continue his

or her employment or wants to be considered for employment. This result would eviscerate both federal and state remedies to employment discrimination and would eliminate the role of the courts in implementing anti-discrimination statutes, in developing the law under those statutes, and in assuring that the cases brought under those statutes are decided consistent with the law, because with respect to private grievance procedures, including arbitration, there is little or no opportunity for judicial review. *See, e.g., Paperworkers v. Misco*, 484 U.S. 29, 36-37 (1987) (citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960) and *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649-50 (1986)).

In response to this concern that employers would begin to require employees, as a condition of employment, to waive their right to pursue discrimination claims under federal law, the Equal Employment Opportunity Commission has issued a lengthy commentary regarding its position on the issue. *See Policy Statement on Mandatory Arbitration*, EEOC Notice No. 915.002, July 10, 1997. In this *Policy Statement*, the Commission criticized agreements that required an employee, as a condition of employment, to give up the right to pursue federal discrimination claims in court and to submit all such claims to arbitration. Specifically, the Commission stated that:

> Through its public nature — manifested through published decisions — the exercise of judicial authority is subject to public scrutiny and to system-wide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the anti-discrimination laws in accord

> with the public values underlying them, they are subject to higher level courts and to Congress.
>
> These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997) (former employee may bring a claim for retaliation); *O'Conner v. Consolidated Coin Caterers, Corp.*, 116 S.Ct. 1307 (1996) (comparator in age discrimination case need not be under forty); *McKennon*, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and *Harris*, 510 U.S. 17 (no requirement that sexual harassment plaintiffs prove psychological injury to state a claim).

EEOC Notice at IV (B), p. 3. Thus, if the relief requested in this Petition is granted, this Court will set a precedent that federalizes all employment contracts, including contracts of adhesion similar to the agreement at issue in this case between construction and/or maintenance workers and their employer, who conditions continued employment on the employee's prospective waiver of his statutory remedies for discrimination.

Despite the petitioners lengthy argument regarding preventing the hostility toward arbitration that Congress sought to eliminate when it enacted the Federal Arbitration Agreement seventy-five years ago, the respondents submit that the decisions of the West Virginia courts do not evidence

any hostility toward the FAA. The decisions of the West Virginia courts do, however, evidence a hostility toward contracts of adhesion similar to the agreement at issue in this case. The bargaining positions of the parties in this case, a large corporate employer and individual construction/ maintenance employees, are clearly not comparable, and the respondents in this case cannot be said to have voluntarily entered into an agreement to submit employment discrimination claims to binding arbitration. As the *Gilmer* dissent noted, during Senate Judiciary Subcommittee hearings regarding the FAA,

> the ABA committee responsible for drafting the bill assured the Senators that the bill "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923).

Gilmer, 500 U.S. at 39. Based upon this legislative intent, a contract of employment in which an employer, as a condition of employment, requires its employees to either waive the remedies afforded to them in federal and state anti-discrimination statutes or to become unemployed, is not a voluntary agreement as considered by Congress to be included in the provisions of the FAA.

The consequences of the West Virginia decisions will not undermine the stability of interstate business transactions, but if this Court grants this Petition, the consequence of that decision will be to undermine the stability and the

effectiveness of both federal and state anti-discrimination statutes. Accordingly, the decision of the Circuit Court of Kanawha County, West Virginia must stand.

CONCLUSION

For the foregoing reasons, the respondents, Warren J. Breckenridge, Jr. and Charles Lee Booker, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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